No. 91-1357

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROLANDO PERALTA,
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether hearsay statements of an acquitted co-conspirator are admissible under the co-conspirator exception to the hearsay rule and whether their admission into evidence violates the Confrontation Clause?

2. Whether the Due Process Clause is violated when the jury is instructed to decide the admissibility of co-conspirator hearsay statements under a preponderance of the evidence standard?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, ROLANDO PERALTA, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on October 31, 1991.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are the parties shown in the caption of the case, Rolando Peralta and the United States of America.

OPINION BELOW

The decision of the Court of Appeals is attached hereto as Appendix A and B.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 and Rule 17 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in pertinent part: "No person shall...be deprived of life, liberty or property, without due process of law..."

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

STATEMENT OF THE FACTS

The Petitioner Rolando Peralta was convicted of conspiring to take a hostage and to commit extortion in violation of 18 U.S.C. §371, hostage taking in violation of 18 U.S.C. §1203, and extortion in violation of 18 U.S.C. §1951. Maria Robleto was kidnapped in Mexico City. Her mother, Indiana Robleto, received notice of the kidnapping and conducted the

ransom negotiations.

Indiana Robleto was told by one of the kidnappers to call "Rolando." She telephoned Rolando Peralta, the Petitioner, but he denied knowing anything about the kidnapping. Indiana Robleto and Peralta argued about past money disputes over the telephone and Peralta refused to speak with her.

The FBI suggested that Indiana Robleto telephone Peralta's secretary Socorro Contreras and use Contreras as a mediator. These telephone call conversations were tape recorded and as a result of this contact Maria Robleto was eventually set free by her kidnappers.

At Peralta's trial the Government offered into evidence the telephone calls between Indiana Robleto and Socorro Contreras. Peralta objected to the admission of this evidence. The objection

was overruled and the statements of Socorro Contreras which implicated Peralta in the kidnapping were admitted as co-conspirator statements.

At the close of the Government's evidence, the District Court granted a judgment of acquittal in the case of Socorro Contreras on all counts, including the conspiracy. Peralta moved unsuccessfully for a mistrial arguing that Contreras' acquittal of conspiracy rendered her statements inadmissible.

When the parties and the Court settled the jury instructions, the District Court agreed to instruct the jury pursuant to E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, section 27.06. (11 R.T. 98). That instruction provided in part that "Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that

defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member..." [emphasis added]

During final argument to the jury, Mr. Peralta's counsel argued to the jury that the above instruction required the jury to find beyond a reasonable doubt that Contreras was a member of the conspiracy before they could consider her statements against Dr. Peralta. (11 R.T. 130) The trial judge interrupted the argument and stated that Dr. Peralta's counsel was misstating the law. The Court stated that the jury was required to be convinced beyond a reasonable doubt that Dr. Peralta was a member of the conspiracy before it could convict him. However, the

Court told the jury that in order to consider the statements of Contreras against Dr. Peralta, the jury need only find by a preponderance of the evidence that Socorro Contreras was a member of the conspiracy. (11 R.T. 133-134)

Outside of the presence of the jury, Dr. Peralta objected to the Court's modification of Devitt and Blackmar, Instruction 27.06, stating that the appropriate standard of proof was proof beyond a reasonable doubt. Dr. Peralta also moved for a mistrial. The trial court overruled the objection and denied the motion for a mistrial. (12 R.T. 3-8) The jury was then again instructed during the Court's final jury instruction as follows:

> Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person

found to be a member by a preponderance of the evidence may be considered by the jury in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of Court, by one person, may not be considered as evidence against any person who was not present and did not hear the statement made, or see the act done.

Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person making them.

Thus, unless you find by a preponderance of the evidence that Socorro Contreras was a member of the conspiracy at the time statements and acts of the defendants as described by her allegedly occurred, you must disregard all such statements

by Socorro Contreras.

> A "preponderance of the evidence" means that a given proposition is more likely true than not. (12 R.T. 48-49) [emphasis added]

On appeal to the United States Court of Appeals for the Ninth Circuit, Dr. Peralta argued: (1) error in the admission of Socorro Contreras' hearsay statements under the co-conspirator exception; (2) error in instructing the jury to redetermine admissibility of co-conspirator statements under a preponderance of the evidence test; (3) error in admitting expert testimony on the Stockholm Syndrome; and (4) that the United Stated had no jurisdiction over a kidnapping in Mexico. The Ninth Circuit affirmed the conviction.

REASONS FOR GRANTING CERTIORARI

I

THE HEARSAY STATEMENTS OF AN ACQUITTED CO-CONSPIRATOR ARE NOT ADMISSIBLE UNDER THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE AND THEIR ADMISSION INTO EVIDENCE VIOLATES THE CONFRONTATION CLAUSE

In this case, two Defendants were charged with conspiracy. One of the Defendants was acquitted at the close of the Government's case. During the trial, the hearsay statements of the acquitted Defendant were introduced into evidence against the other Defendant. The hearsay statements of the acquitted Defendant were very incriminating and accused the other Defendant of involvement in the crime. The issue raised in this case is whether the acquittal of the hearsay declarant of the crime of conspiracy prevents the use of the acquitted Defendant's statements under the co-conspirator exception to the hearsay rule.

Federal Rule of Evidence 801(d)(2)(E) provides: "A statement is not hearsay if... [t]he statement is offered against a party and is...a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Fed.R.Evid. 801(d)(2)(E). Such evidence is admissible upon a foundation that: "(1) the declaration was in furtherance of the conspiracy, (2) it was made during the pendency of the conspiracy, and (3) there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant to it." United States v. Weiner, 578 F.2d 757, 768 (9th Cir. 1978). See also, Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Fleishman, 684 F.2d 1329, 1337 (9th Cir. 1982); United States v. Weaver, 594 F.2d 1272, 1274 (9th Cir. 1979); United States v. Testa, 548 F. 2d 847, 852 (9th Cir. 1977).

The rationale for admitting co-conspirator statements against a defendant in a criminal case is the "law of agency." United States v. Layton, 855 F.2d 1388, 1398 (9th Cir. 1988). "Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statement of a party." Lutwak v. United States, 344 U.S. 604, 617 (1953)[emphasis added].

Judge Learned Hand in discussing the law of conspiracy has stated that "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and, as

declarations may be such acts, they are competent against all." Van Riper v. United States, 13 F.2d 961, 967 (2nd Cir. 1926).

More recently in United States v. Bourjaily, 483 U.S. 171, 188 (1987), Justice Blackman in his dissent noted concerning the co-conspirator exception to the hearsay rule that "[b]y all accounts, the exemption was based upon agency principles, the underlying concept being that a conspiracy is a common undertaking where the conspirators are all agents of each other and where the acts and statements of one can be attributed to all."

In Dr. Peralta's case, the acquittal of Socorro Contreras of the crime of conspiracy meant that for purposes of Dr. Peralta's trial, Socorro Contreras was not a member of the conspiracy to commit kidnapping and extortion. Contreras was thus not acting as the agent of anyone who

was a party to that conspiracy. Contreras' status was that of an ordinary witness whose out-of-court statements were inadmissible under the hearsay rule. Contreras' acquittal of the conspiracy charge meant that she was not acting as the agent of Peralta and it was therefore error to admit Contreras' tape-recorded statements into evidence against Peralta.

The Ninth Circuit's decision in Peralta's case failed to recognize the relationship between an individual's substantive conspiratorial liability and the evidentiary rule which allows otherwise inadmissible hearsay statements of the individual to be admitted against others. As explained above, the theory which underlies the admission of co-conspirator statements is that a person who is a member of a conspiracy is an agent of all other members of the con-

spiracy and thus his or her statements are deemed to be an admission as to other members of the conspiracy. Accordingly, where it is determined that individual ("A") is not a member of a conspiracy as a matter of substantive criminal law, that individual can no longer be said to be an agent of another person ("B") who is alleged to be a member of a conspiracy and thus "A"'s statements are no longer an admission as to "B".

The admission of the tape-recorded statements of Socorro Contreras into evidence was error for another reason. The admission of the statements violated Dr. Peralta's constitutional right to confront and cross-examine his accusers. The Sixth Amendment Confrontation Clause provides that "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

See, Ohio v. Roberts, 448 U.S. 56 (1980); United States v. Inadi, 475 U.S. 387 (1986); Bruton v. United States, 391 U.S. 123 (1968).

In Bourjaily v. United States, 483 U.S. 171, 183 (1987), the Supreme Court stated that "we think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in Roberts, a court need not independently inquire into the reliability of such statements." Nevertheless, Peralta submits that Bourjaily should not be construed as prohibiting all Confrontation Clause inquiries in every case. Certainly some circumstances may exist in which the admission of highly unreliable hearsay statements will violate the Confrontation Clause.

II

THE DUE PROCESS CLAUSE IS VIOLATED WHEN THE JURY IS INSTRUCTED TO DECIDE THE ADMISSIBILITY OF CO-CONSPIRATOR HEARSAY STATEMENTS UNDER A PREPONDERANCE OF THE EVIDENCE STANDARD

The trial court admitted the hearsay statements of Socorro Contreras against Dr. Peralta, even though Contreras was acquitted of conspiracy. The trial court stated that it had been proven by a preponderance of the evidence that Socorro Contreras was a member of the conspiracy. The court then instructed the jury that Socorro Contreras' out-of-court statements could be used against Dr. Peralta if the jury found by a preponderance of the evidence that Socorro Contreras was a member of the conspiracy.

This jury instruction had the effect of allowing the jury to convict Dr. Peralta based upon the lesser standard of proof

used in civil cases, proof by a preponderance of the evidence. The reason this is so is because the foundational requirements for the admissibility of the co-conspirator statements coincide with the ultimate question of guilt or innocence of Dr. Peralta of the crime of conspiracy. Once the jury found by a preponderance of the evidence that Contreras was a member of the conspiracy, then the jury was authorized to use her tape-recorded hearsay statements as evidence of Dr. Peralta's guilt. If the jury thereafter convicted Dr. Peralta on the basis of this evidence, found only by a preponderance of the evidence to be true, then Dr. Peralta's right to be convicted only upon proof beyond a reasonable doubt was violated.

In the case of In re Winship, 397 U.S. 358, 364 (1970), the United States Supreme Court stated that "Lest there

remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Where, as in Dr. Peralta's case, the jury is instructed to redetermine admissibility of the co-conspirator statement, using the preponderance of the evidence standard of proof, a defendant's constitutional right to due process is violated. In re Winship, 397 U.S. 358 (1970).

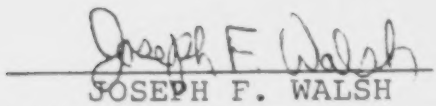
It is true that the foundational requirements for the admissibility of co-conspirator statements need only be proven by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171, 176 (1987); United States v. Silverman,

861 F.2d 571, 576 (9th Cir. 1988); United States v. Zavala-Serra, 853 F.2d 1512,1514 (9th Cir. 1988). However, the preponderance of the evidence standard was intended to be used only by the trial judge in ruling upon the admissibility of the co-conspirator statements. United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 22-23 (1st Cir. 1977). Under Federal Rules of Evidence, Rule 104, the court, not the jury, determines the admissibility of the hearsay statements. United States v. Federico, 658 F.2d 1337, 1434 (9th Cir. 1981); United States v. Lutz, 621 F. 2d 940, 946 n.2 (9th Cir. 1980).

CONCLUSION

Based upon the foregoing, Petitioner urges that this writ be granted.

Respectfully submitted,



JOSEPH F. WALSH
Attorney for Petitioner
ROLANDO PERALTA

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROLANDO PERALTA, *Defendant-Appellant.*	No. 90-50186 D.C. No. CR 89-578-(A)-JMI ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
June 3, 1991—Pasadena, California

Filed August 14, 1991
Amended October 31, 1991

Before: Alfred T. Goodwin, Harry Pregerson and
Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Alarcon

COUNSEL

Edward I. Gritz, Los Angeles, California; Joseph Walsh, Los Angeles, California, for the defendant-appellant.

Carol L. Gillam, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

ORDER

The opinion filed August 8, 1991 is amended as follows:

(1) By striking the first full paragraph on page 11208 of the slip opinion which begins with: "We review jury instructions . . . ."

(2) By inserting on the last line of page 11208 the following language after the word "attorney" and before the sentence commencing with "The jury was properly . . .":

> An appellant cannot argue on appeal instructional error which he or she invited. *See United States v. Alexander*, 695 F.2d 398, 402 (9th Cir. 1982).

Subject to this amendment, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge of the court has requested a vote thereon. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

ALARCON, Circuit Judge:

Rolando Peralta appeals from the judgment of conviction entered following a trial by jury. Peralta was found guilty of conspiring to take a hostage and to commit extortion in violation of 18 U.S.C. § 371, hostage taking in violation of 18 U.S.C. § 1203, and extortion in violation of 18 U.S.C. § 1951. Peralta seeks reversal on the following grounds:

One. The district court erred in admitting hearsay statements under the co-conspirator exception because a judgment of acquittal of the conspiracy charge was entered in favor of the declarant.

Two. The district court erred in admitting expert testimony regarding the behavior of kidnap victims.

Three. The district court did not have jurisdiction over a charge alleging the taking hostage of a citizen of Nicaragua in Mexico.

We conclude that each of these contentions lacks merit and affirm the judgment.

I

Pertinent Factual Background

Peralta was accused of having ordered the kidnapping of Maria Robleto, daughter of Peralta's former lover, Indiana Robleto. Also charged in the conspiracy count were Socorro

Contreras and Rigoberto Herrera. The Government's theory at trial was that Maria Robleto was kidnapped in Mexico to induce Indiana Robleto to sign quit claim deeds on real property held jointly with Peralta, and to force her to return money he claimed was stolen from him.

At the suggestion of the Federal Bureau of Investigation, Indiana Robleto asked Contreras to act as an intermediary in the negotiations for Maria's release. At trial, the Government introduced evidence of the tape recorded ransom negotiations between Indiana Robleto and Contreras. At the completion of the Government's case, the district court granted Contreras' motion for a judgment of acquittal.

II

Admissibility Of Declarations Of Third Person Acquitted Of Conspiracy

The district court admitted into evidence tape recordings containing Contreras' extrajudicial declarations under the co-conspirator exception to the hearsay rule set forth in Rule 801(d)(2)(E) of the Federal Rules of Evidence. Peralta contends that these recordings were not admissible under Rule 801(d)(2)(E) because the district court entered a judgment of acquittal of the conspiracy charge against Contreras at the end of the Government's case. Rule 801(d)(2)(E) provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. Fed. R. Evid. 801(d)(2)(E).

> Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied . . . that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy." . . . [T]he existence of a conspiracy and

> petitioner's involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court.

Bourjaily v. United States, 483 U.S. 171, 175 (1987). The Government must prove that the declarant was a member of the conspiracy by a preponderance of the evidence, before the trial court can admit a co-conspirator's statement. *Id.*

> The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case, or a civil case.

Id. (citations omitted).

We review a district court's decision to admit evidence of a co-conspirator's declaration for abuse of discretion. *United States v. Torres*, 908 F.2d 1417, 1424 (9th Cir.), *cert. denied*, 111 S. Ct. 366 (1990) (citing *United States v. Sanchez-Lopez*, 879 F.2d 541, 553 (9th Cir. 1989)).

> We review the district court's finding that: 1) there was a conspiracy and 2) the statement was made "during" and "in furtherance of" the conspiracy for clear error. *See United States v. Zavala-Serra*, 853 F.2d 1512, 1515 (9th Cir. 1988). In other words, we cannot upset such findings unless the district court "could not reasonably have come to that conclusion." *United States v. Echeverry*, 759 F.2d 1451, 1457 (9th Cir. 1985).

Torres, 908 F.2d at 1424.

[1] This circuit has not previously determined whether the extrajudicial statements of a person, made in furtherance and

during the course of a conspiracy, can be considered by a jury under the co-conspirator exception, where the declarant has been acquitted of conspiracy charges. Each circuit that has confronted this question has held that the acquittal of the declarant of conspiracy does not render the statement inadmissible under the co-conspirator exception. *United States v. Carrol*, 860 F.2d 500, 506 (1st Cir. 1988); *United States v. Kincade*, 714 F.2d 1064, 1065 (11th Cir. 1983) *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979); *United States v. Stanchich*, 550 F.2d 1294, 1299 (2nd Cir. 1977); *United States v. Cravero*, 545 F.2d 406, 419 (5th cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *United States v. Bass*, 472 F.2d 207, 213-14 (8th Cir.), *cert. denied*, 412 U.S. 928 (1973).

In *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977), the district court allowed the statements of co-conspirators to be admitted at trial after dismissing conspiracy charges against defendant and the co-conspirator at the end of the Government's case. *Id.* at 1298-1299. In affirming the district court, the Second Circuit reasoned as follows:

> Appellant argues that the same considerations that led the judge to dismiss the conspiracy count required him to hold the declarations inadmissible on the substantive counts. The argument overlooks the difference in the standards governing the two determinations. In deciding whether the evidence is sufficient to warrant submission of a conspiracy count to a jury, the judge must determine . . . "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." A judge may thus consistently find that the evidence (even including admissible hearsay declarations) did not meet the higher test required for submission of a conspiracy count to a jury, although the independent evidence did meet the lower [prepon-

> derance of the evidence] test required for admission of the declaration.

Id. at 1299 (citations omitted) (footnote omitted).

In *United States v. Gil*, 604 F.2d 546 (7th Cir. 1979), in explaining its rejection of the rule proposed by Peralta, the Seventh Circuit stated that "the differences between what must be proved to invoke the hearsay exception and what must be proved in order to convict a person of the crime of conspiracy, as well as the difference of the burden of proof, mean that neither collateral estoppel nor res judicata automatically bar the use of statements by a person who has been acquitted of the crime of conspiracy." *Id.* at 549 (citing *United States v. Cravero*, 545 F.2d 406, 419 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977)). In reaching this conclusion, the court in *Gil* relied on agency law principles.

> The co-conspirator exception to the hearsay rule . . . is merely a rule of evidence founded, to some extent, on concepts of agency law. It may be applied in both civil and criminal cases . . . Its rationale is the common sense appreciation that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not.

Id. (quoting *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977)).

Peralta argues that a person who is determined not to be a member of a conspiracy in a criminal proceeding "can no longer be said to be an agent of another person." Thus, he urges this court not to follow those circuits that allow admission under Rule 801(d)(2)(E) of the statements of a person acquitted of conspiracy charges.

[2] Peralta's argument confuses the burden of persuasion that is required for the admission of a co-conspirator's state-

ment with the requirement that a person cannot be convicted of the crime of conspiracy unless his or her guilt is proved beyond a reasonable doubt. This distinction was recognized by the court in *Gil*:

> The substantive criminal law of conspiracy, though it obviously overlaps in many areas, simply has no application to this evidentiary principle. Thus, once the existence of a joint venture for an illegal purpose, or for a legal purpose using illegal means, and a statement made in the course of and in furtherance of that venture have been demonstrated by a preponderance of the evidence, it makes no difference whether the declarant or any other "partner in crime" could actually be tried, convicted and punished for the crime of conspiracy.

604 F.2d at 549-50.

In *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989), we held that statements made by a party to an agreement were admissible under Rule 801(d)(2)(E), notwithstanding the fact the venture could not be prosecuted as a criminal conspiracy because it had a lawful objective. *Id.* at 1400.

After reviewing the underpinnings of the co-conspirator exception in the law of common enterprise, joint venture, and agency, we stated:

> If the appropriate basis for admitting the statements of a confederate is that his participation in a common enterprise with the defendant makes him an agent of the accused, then the goal or objective of the common enterprise would appear to be irrelevant. The critical inquiry is simply whether the confederate was acting in his capacity as an agent of the defen-

> dant when he uttered the statements sought to be admitted . . . .

Id. at 1399.

[3] Our adoption of the principles of the agency law in *Layton*, to support the admission of a co-conspirator's declaration, is consistent with the reasoning employed by those circuits that have ruled that acquittal of criminal conspiracy charges does not affect the admissibility of such evidence pursuant to Rule 801(d)(2)(E). Accordingly, we hold that if a district court is persuaded by a preponderance of the evidence that the declarant and the accused were members of a conspiracy, the declarant's statement is admissible notwithstanding the fact that the court concludes that the evidence is insufficient under the reasonable doubt standard to support a *conviction* of the declarant of the crime of conspiracy.

Peralta also attacks the admission of Contrera's statements on the ground that "there was no independent evidence of Rolando Peralta's participation in the conspiracy, absent the alleged co-conspirator statements of Socorro Contreras." We disagree.

[4] In *United States v. Silverman*, 861 F.2d 571 (9th Cir. 1988), we held that a co-conspirator's statement, offered to show the defendant's participation in a conspiracy as a foundation for admission of the extrajudicial declaration in evidence, must be supported by independent proof. *Id.* at 577. The record in this matter contains sufficient independent evidence that Peralta was a member of the conspiracy to satisfy the *Silverman* rule. Indiana Robleto and Maria Robleto testified that the kidnappers demanded that the ransom money and the quit claim deed be delivered to "Rolando." The district court did not abuse its discretion in concluding that Contreras' statements were corroborated by sufficient independent evidence to justify their admission into evidence under Rule 801(d)(2)(E).

[5] Peralta further contends that the admission of the co-conspirator's statements violated his right of confrontation and to cross-examine his accusers under the sixth amendment. This argument is without merit.

In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Supreme Court held that "the requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause." *Id.* at 182. "When a coconspirator's statement satisfies the requirements for admission under [the Rule], it satisfies the requirements of the confrontation clause, as well." *United States v. Layton*, 855 F.2d 1388, 1401 (9th Cir. 1988)(citing *Bourjaily* at 182).

III

Impact Of The Court's Instruction On Admissibility Of Statements Of Co-Conspirators

Peralta asserts that the district court committed reversible error by instructing the jury that:

> Whenever it appears *beyond a reasonable doubt* from the evidence in a case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made, and the acts thereafter knowingly done by any person found to be a member *by a preponderance of the evidence* may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence or without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Peralta argues that the jury should have been instructed that a co-conspirator's declaration cannot be considered unless the

evidence shows beyond a reasonable doubt that the declarant was a member of the conspiracy.

Peralta concedes that a trial court may admit a co-conspirator's statements if it is persuaded by a preponderance of the evidence that the declarant and the defendant were members of a conspiracy. Peralta also concedes that once the judge determines that the hearsay statements are admissible under the co-conspirator exception, the jury should not be instructed that it must determine admissibility. *United States v. Lutz*, 621 F.2d 940, 946 n.2 (9th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981).

[6] The district court instructed the jury on the admissibility of a co-conspirator's declaration in response to the erroneous statement by Peralta's trial counsel during closing argument that the jury must be persuaded beyond a reasonable doubt that such evidence is *admissible* before it can be considered against the accused. Thus, any error in admonishing the jury concerning the admissibility of evidence was invited by Peralta's attorney. An appellant cannot argue on appeal instructional error which he or she invited. *See United States v. Alexander*, 695 F.2d 398, 402 (9th Cir. 1982). The jury was properly instructed on the Government's duty to prove each element of the crime of conspiracy beyond a reasonable doubt. Peralta has failed to demonstrate that the instruction was harmful. *See Lutz*, 621 F.2d at 946 n.2 (an instruction on admissibility of evidence while erroneous can be beneficial to the defendant).

IV

Admissibility Of Expert Testimony Concerning The "Stockholm Syndrome"

Peralta asserts that the district court abused its discretion in allowing expert testimony by Special Agent Gary Wayne Fusilier, a clinical psychologist employed by the Federal

Bureau of Investigation. Peralta does not claim that it was inappropriate to allow Fusilier to give expert testimony concerning the "Stockholm Syndrome."[1] Instead, he argues that the testimony was improperly used to prove that Maria Robleto had in fact been taken hostage, and to vouch for her credibility.

We review the admission of expert testimony for abuse of discretion. *United States v. Aguon*, 851 F.2d 1158, 1171 (9th Cir. 1988).

> A qualified expert witness may testify if the witness' "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue .... " Fed. R. Evid. 702. Testimony is admissible under Rule 702 if the subject matter at issue is beyond the common knowledge of the average layman, the witness has sufficient expertise, and the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion.

United States v. Winters, 729 F.2d 602, 605 (9th Cir. 1984) (citations omitted). In *Winters*, we upheld the admission of expert testimony concerning the psychological impact of post-traumatic stress disorder, to explain the behavior of two women who failed to take advantage of opportunities to escape or summon help after they were kidnapped and forced into prostitution. *Id.*

Peralta argues that this court should apply the California Supreme Court's holding in *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) to this matter. Peralta's reliance on *Bledsoe* is misplaced. In *Bledsoe*, the court held that evidence of expert testimony of rape trauma

[1]The Stockholm Syndrome has been described as "a psychological phenomenon whereby a hostage develops positive feelings for his or her captor." *United States v. Chancey*, 715 F.2d 543, 547 (11th Cir. 1983).

syndrome was inadmissible to prove the fact of rape. 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460. The California Supreme Court analyzed its holding as follows:

> In a number of the cases in which the issue has arisen, the alleged rapist has suggested to the jury that some conduct of the victim after the incident — for example, a delay in reporting the sexual assault — is inconsistent with her claim of having been raped, and evidence on rape trauma syndrome has been introduced to rebut such an inference by providing the jury with recent findings of professional research on the subject of a victim's reaction to sexual assault. As a number of decisions have recognized, *in such a context expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.*
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> In the present case, however, the evidence was not admitted for any such purpose. Here, the victim promptly reported the attack, immediately exhibited the severe emotional reaction that the normal lay juror would associate with rape and suffered bruises and other physical injuries that corroborated her claim that she had been violently assaulted. As far as our review of the record reveals, *defendant made no claim that [the victim's] conduct or demeanor after the incident provided any basis for the jury to infer that she had not been raped.*

36 Cal. 3d at 247-48, 681 P.2d at 298-99, 203 Cal. Rptr. at 457-58 (emphasis added) (citations omitted).

[7] In opposing the admission of the expert's testimony Peralta's counsel argued to the district court: "We are saying

that because of her actions in this case being so unusual, they are inconsistent with, in fact, a kidnapping having occurred . . . ." The testimony of the expert witness was admissible to explain Maria Robleto's conduct *after* she was kidnapped and held hostage. It was not offered to prove that she was kidnapped. The district court did not abuse its discretion in concluding that the expert testimony would assist the jury in understanding the evidence.

V

Jurisdiction Over Hostage Taking Of A Nicaraguan Citizen In Mexico

Peralta asserts that the district court erred in denying his motion to dismiss the second count of the indictment which charged him with hostage taking in violation of 18 U.S.C. § 1203. He argues that since the victim was a citizen of Nicaragua, kidnapped in Mexico, the district court had no jurisdiction. This contention is without merit. We review de novo a district court's assumption of jurisdiction. *United States v. Layton*, 855 F.2d 1388, 1394 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989).

[8] Peralta concedes that "[u]nder the Constitution, Congress does have the power to legislate overseas and define and punish offenses committed on foreign soil under certain circumstances." *See Chua Han Mow v. United States*, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (discussing appropriateness of extraterritorial jurisdiction for drug offenses), *cert. denied*, 470 U.S. 1031 (1985). Peralta argues that "[i]n the present case, the absence of an American National as the victim of the hostage-taking and the absence of any evidence indicating that the hostage-taking was related to international terrorism, means that a United States federal district court did not have jurisdiction to prosecute the kidnapping of the Nicaraguan citizen which occurred in Mexico." The record does not support this contention.

The language of the statute in question makes clear that it is an offense punishable in the district court to kidnap a foreign national outside the United States. To fall within the scope of the section, the act must have been done "in order to compel a third person . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained . . . ." 18 U.S.C. § 1203(a). If the offense occurs outside the United States, "the offender or the person seized or detained [must be] a national of the United States" or the offender must be "found in the United States" or the hostage taking must have been done to compel an act or omission by the Government of the United States. 18 U.S.C. § 1203(b)(1)(A)-(C).

[9] The indictment alleged that Peralta directed the kidnapping of Maria Robleto in Mexico in order to compel her mother, a resident of California, to surrender her interest in certain California real estate and return money owed to him. It is not disputed that at all relevant times Peralta was a national of the United States, and was found and arrested in the United States. Thus, the acts alleged were within the scope of Section 1203 and the district court properly exercised jurisdiction.

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROLANDO PERALTA, *Defendant-Appellant.*	No. 90-50186 D.C. No. CR 89-578-(A)-JMI OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
June 3, 1991—Pasadena, California

Filed August 14, 1991

Before: Alfred T. Goodwin, Harry Pregerson and
Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Alarcon

COUNSEL

Edward I. Gritz, Los Angeles, California; Joseph Walsh, Los Angeles, California, for the defendant-appellant.

Carol L. Gillam, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

ALARCON, Circuit Judge:

Rolando Peralta appeals from the judgment of conviction entered following a trial by jury. Peralta was found guilty of conspiring to take a hostage and to commit extortion in violation of 18 U.S.C. § 371, hostage taking in violation of 18 U.S.C. § 1203, and extortion in violation of 18 U.S.C. § 1951. Peralta seeks reversal on the following grounds:

One. The district court erred in admitting hearsay statements under the co-conspirator exception because a judgment of acquittal of the conspiracy charge was entered in favor of the declarant.

Two. The district court erred in admitting expert testimony regarding the behavior of kidnap victims.

Three. The district court did not have jurisdiction over a charge alleging the taking hostage of a citizen of Nicaragua in Mexico.

We conclude that each of these contentions lacks merit and affirm the judgment.

I

Pertinent Factual Background

Peralta was accused of having ordered the kidnapping of Maria Robleto, daughter of Peralta's former lover, Indiana Robleto. Also charged in the conspiracy count were Socorro Contreras and Rigoberto Herrera. The Government's theory at trial was that Maria Robleto was kidnapped in Mexico to induce Indiana Robleto to sign quit claim deeds on real property held jointly with Peralta, and to force her to return money he claimed was stolen from him.

At the suggestion of the Federal Bureau of Investigation, Indiana Robleto asked Contreras to act as an intermediary in the negotiations for Maria's release. At trial, the Government introduced evidence of the tape recorded ransom negotiations between Indiana Robleto and Contreras. At the completion of the Government's case, the district court granted Contreras' motion for a judgment of acquittal.

II

Admissibility Of Declarations Of Third Person Acquitted Of Conspiracy

The district court admitted into evidence tape recordings containing Contreras' extrajudicial declarations under the co-conspirator exception to the hearsay rule set forth in Rule 801(d)(2)(E) of the Federal Rules of Evidence. Peralta contends that these recordings were not admissible under Rule 801(d)(2)(E) because the district court entered a judgment of acquittal of the conspiracy charge against Contreras at the end of the Government's case. Rule 801(d)(2)(E) provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. Fed. R. Evid. 801(d)(2)(E).

> Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied . . . that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy." . . . [T]he existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court.

Bourjaily v. United States, 483 U.S. 171, 175 (1987). The Government must prove that the declarant was a member of the conspiracy by a preponderance of the evidence, before the trial court can admit a co-conspirator's statement. *Id.*

> The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case, or a civil case.

Id. (citations omitted).

We review a district court's decision to admit evidence of a co-conspirator's declaration for abuse of discretion. *United States v. Torres*, 908 F.2d 1417, 1424 (9th Cir.), *cert. denied*, 111 S. Ct. 366 (1990) (citing *United States v. Sanchez-Lopez*, 879 F.2d 541, 553 (9th Cir. 1989)).

> We review the district court's finding that: 1) there was a conspiracy and 2) the statement was made "during" and "in furtherance of" the conspiracy for clear error. *See United States v. Zavala-Serra*, 853 F.2d 1512, 1515 (9th Cir. 1988). In other words, we cannot upset such findings unless the district court

> "could not reasonably have come to that conclusion." *United States v. Echeverry*, 759 F.2d 1451, 1457 (9th Cir. 1985).

Torres, 908 F.2d at 1424.

[1] This circuit has not previously determined whether the extrajudicial statements of a person, made in furtherance and during the course of a conspiracy, can be considered by a jury under the co-conspirator exception, where the declarant has been acquitted of conspiracy charges. Each circuit that has confronted this question has held that the acquittal of the declarant of conspiracy does not render the statement inadmissible under the co-conspirator exception. *United States v. Carrol*, 860 F.2d 500, 506 (1st Cir. 1988); *United States v. Kincade*, 714 F.2d 1064, 1065 (11th Cir. 1983) *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979); *United States v. Stanchich*, 550 F.2d 1294, 1299 (2nd Cir. 1977); *United States v. Cravero*, 545 F.2d 406, 419 (5th cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *United States v. Bass*, 472 F.2d 207, 213-14 (8th Cir.), *cert. denied*, 412 U.S. 928 (1973).

In *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977), the district court allowed the statements of co-conspirators to be admitted at trial after dismissing conspiracy charges against defendant and the co-conspirator at the end of the Government's case. *Id.* at 1298-1299. In affirming the district court, the Second Circuit reasoned as follows:

> Appellant argues that the same considerations that led the judge to dismiss the conspiracy count required him to hold the declarations inadmissible on the substantive counts. The argument overlooks the difference in the standards governing the two determinations. In deciding whether the evidence is sufficient to warrant submission of a conspiracy count to a jury, the judge must determine . . . "whether upon the evidence, giving full play to the right of the jury

> to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." A judge may thus consistently find that the evidence (even including admissible hearsay declarations) did not meet the higher test required for submission of a conspiracy count to a jury, although the independent evidence did meet the lower [preponderance of the evidence] test required for admission of the declaration.

Id. at 1299 (citations omitted) (footnote omitted).

In *United States v. Gil*, 604 F.2d 546 (7th Cir. 1979), in explaining its rejection of the rule proposed by Peralta, the Seventh Circuit stated that "the differences between what must be proved to invoke the hearsay exception and what must be proved in order to convict a person of the crime of conspiracy, as well as the difference of the burden of proof, mean that neither collateral estoppel nor res judicata automatically bar the use of statements by a person who has been acquitted of the crime of conspiracy." *Id.* at 549 (citing *United States v. Cravero*, 545 F.2d 406, 419 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977)). In reaching this conclusion, the court in *Gil* relied on agency law principles.

> The co-conspirator exception to the hearsay rule . . . is merely a rule of evidence founded, to some extent, on concepts of agency law. It may be applied in both civil and criminal cases . . . Its rationale is the common sense appreciation that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not.

Id. (quoting *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977)).

Peralta argues that a person who is determined not to be a member of a conspiracy in a criminal proceeding "can no longer be said to be an agent of another person." Thus, he urges this court not to follow those circuits that allow admission under Rule 801(d)(2)(E) of the statements of a person acquitted of conspiracy charges.

[2] Peralta's argument confuses the burden of persuasion that is required for the admission of a co-conspirator's statement with the requirement that a person cannot be convicted of the crime of conspiracy unless his or her guilt is proved beyond a reasonable doubt. This distinction was recognized by the court in *Gil*:

> The substantive criminal law of conspiracy, though it obviously overlaps in many areas, simply has no application to this evidentiary principle. Thus, once the existence of a joint venture for an illegal purpose, or for a legal purpose using illegal means, and a statement made in the course of and in furtherance of that venture have been demonstrated by a preponderance of the evidence, it makes no difference whether the declarant or any other "partner in crime" could actually be tried, convicted and punished for the crime of conspiracy.

604 F.2d at 549-50.

In *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989), we held that statements made by a party to an agreement were admissible under Rule 801(d)(2)(E), notwithstanding the fact the venture could not be prosecuted as a criminal conspiracy because it had a lawful objective. *Id.* at 1400.

After reviewing the underpinnings of the co-conspirator exception in the law of common enterprise, joint venture, and agency, we stated:

> If the appropriate basis for admitting the statements of a confederate is that his participation in a common enterprise with the defendant makes him an agent of the accused, then the goal or objective of the common enterprise would appear to be irrelevant. The critical inquiry is simply whether the confederate was acting in his capacity as an agent of the defendant when he uttered the statements sought to be admitted ....

Id. at 1399.

[3] Our adoption of the principles of the agency law in *Layton*, to support the admission of a co-conspirator's declaration, is consistent with the reasoning employed by those circuits that have ruled that acquittal of criminal conspiracy charges does not affect the admissibility of such evidence pursuant to Rule 801(d)(2)(E). Accordingly, we hold that if a district court is persuaded by a preponderance of the evidence that the declarant and the accused were members of a conspiracy, the declarant's statement is admissible notwithstanding the fact that the court concludes that the evidence is insufficient under the reasonable doubt standard to support a *conviction* of the declarant of the crime of conspiracy.

Peralta also attacks the admission of Contrera's statements on the ground that "there was no independent evidence of Rolando Peralta's participation in the conspiracy, absent the alleged co-conspirator statements of Socorro Contreras." We disagree.

[4] In *United States v. Silverman*, 861 F.2d 571 (9th Cir. 1988), we held that a co-conspirator's statement, offered to show the defendant's participation in a conspiracy as a foundation for admission of the extrajudicial declaration in evidence, must be supported by independent proof. *Id.* at 577. The record in this matter contains sufficient independent evidence that Peralta was a member of the conspiracy to satisfy

the *Silverman* rule. Indiana Robleto and Maria Robleto testified that the kidnappers demanded that the ransom money and the quit claim deed be delivered to "Rolando." The district court did not abuse its discretion in concluding that Contreras' statements were corroborated by sufficient independent evidence to justify their admission into evidence under Rule 801(d)(2)(E).

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> ber, even though the statements and acts may have occurred in the absence or without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Peralta argues that the jury should have been instructed that a co-conspirator's declaration cannot be considered unless the evidence shows beyond a reasonable doubt that the declarant was a member of the conspiracy.

We review jury instructions as a whole to determine if they are misleading or inadequate. *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1388 (9th Cir. 1991). "Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing they constitute an abuse of the trial court's discretion." *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), *cert. denied*, 474 U.S. 925 (1985).

Peralta concedes that a trial court may admit a co-conspirator's statements if it is persuaded by a preponderance of the evidence that the declarant and the defendant were members of a conspiracy. Peralta also concedes that once the judge determines that the hearsay statements are admissible under the co-conspirator exception, the jury should not be instructed that it must determine admissibility. *United States v. Lutz*, 621 F.2d 940, 946 n.2 (9th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981).

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[7] In opposing the admission of the expert's testimony Peralta's counsel argued to the district court: "We are saying that because of her actions in this case being so unusual, they are inconsistent with, in fact, a kidnapping having occurred . . . ." The testimony of the expert witness was admissible to explain Maria Robleto's conduct *after* she was kidnapped and held hostage. It was not offered to prove that she was kidnapped. The district court did not abuse its discretion in concluding that the expert testimony would assist the jury in understanding the evidence.

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The language of the statute in question makes clear that it is an offense punishable in the district court to kidnap a foreign national outside the United States. To fall within the scope of the section, the act must have been done "in order to compel a third person . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained . . . ." 18 U.S.C. § 1203(a). If the offense occurs outside the United States, "the offender or the person seized or detained [must be] a national of the United States" or the offender must be "found in the United States" or the hostage taking must have been done to compel an act or omission by the Government of the United States. 18 U.S.C. § 1203(b)(1)(A)-(C).

[9] The indictment alleged that Peralta directed the kidnapping of Maria Robleto in Mexico in order to compel her mother, a resident of California, to surrender her interest in certain California real estate and return money owed to him. It is not disputed that at all relevant times Peralta was a national of the United States, and was found and arrested in the United States. Thus, the acts alleged were within the scope of Section 1203 and the district court properly exercised jurisdiction.

AFFIRMED.